fendant at one moment claims that the bill of sale, until set aside, is a complete bar to plaintiff's action, because it purports to convey all of plaintiff's interest in the *partnership;* and then in the next vehemently asserts that the ventures in vouchers and whiskey were *defendant's own individual speculations.*

For the reasons heretofore given there existed no necessity for rescinding the sale, nor that the present action should have been brought for that purpose and with that theory in view. The evident object of the petition is to have an account taken as to those matters which were in reality *outside and independent* of the sale, although apparently embraced within its terms.

Judgment reversed and cause remanded, with directions to the court below to have an account taken in conformity with this opinion, and in thus taking the account the defendant is to be treated in all respects as a trustee.

ABSTRACTS OF RECENT AMERICAN DECISIONS.

SUPREME COURT OF THE UNITED STATES.[1]
SUPREME JUDICIAL COURT OF NEW HAMPSHIRE.[2]
COURT OF CHANCERY OF NEW JERSEY.[3]
SUPREME COURT OF WISCONSIN.[4]

ADMIRALTY.

Navigability of Waters.—The navigability of a stream, for the purpose of bringing it within the terms "navigable waters of the United States," does not depend upon the mode by which commerce is conducted upon it, as whether by steamers, or sailing-vessels, or Durham boats, nor upon the difficulties attending navigation; such as those made by falls, rapids and sand-bars, even though these be so great as that while they last they prevent the use of the best means, such as steamboats, for carrying on commerce. It depends upon the fact whether the river in its natural state is such as that it affords a channel for useful commerce: *The Montello*, 20 Wall.

These doctrines applied to the Fox river, in Wisconsin, a river whose navigability was originally so much embarrassed by rocks, rapids, &c., as that only Durham boats could use the stream, but which afterwards, by canals, locks and other artificial means, was so much improved as that steamboats could use it freely; the river having, however, never, in its natural state, been a channel for useful commerce: *Id.*

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[1] From J. W. Wallace, Esq., Reporter; to appear in vol. 20 of his Reports.
[2] From J. M. Shirley, Esq., Reporter; to appear in 54 N. H. Reports.
[3] From C. E. Green, Esq., Reporter; to appear in vol. 10 of his Reports.
[4] From Hon. O. M. Conover, Reporter; to appear in 35 or 36 Wis. Reports.

Agent.

Implied Authority to receive Payment—Estoppel.—It is well settled that a debtor is authorized to infer that an attorney or agent who has been employed to make a loan is empowered to receive both principal and interest from his having possession of the bond and mortgage given for the loan, or of the bond only. But the inference in such cases is founded on the custody of the securities, and it ceases whenever they are withdrawn by the creditor, and it is incumbent on the debtor who makes payment to the attorney or agent, relying on such inference, to show that the securities were in his possession on each occasion when the payments were made: *James* v. *Pohlman et al.*, 10 C. E. Green.

Payments made to an agent on account of principal and interest of a bond allowed the debtor, the action of the creditor estopping him from denying the agency and relieving the debtor from seeing to it that the agent had possession of the securities when the payments were made: *Id.*

Bankruptcy.

Preference—Divesting of valid Lien.—A valid lien is not divested by the mere fact of the holder of it subsequently taking a transfer of the equity of redemption, made to him with a view of giving to him a preference, and in violation of the Bankrupt Act. The transfer of the equity of redemption of course is void: *Avery* v. *Hackley*, 20 Wall.

Collateral Security.

Sale of Collaterals is Payment pro tanto—Injunction against Suit on the Debt will not be granted.—That a plaintiff in a suit at law to recover moneys due upon certain notes and checks, has assigned for full value a mortgage given to him by the defendant in that suit, and intended as collateral security merely, furnishes no ground for injunction to restrain the suit. The assignment is a payment *pro tanto*, of which the defendant might avail himself in the suit at law: *Hewitt* v. *Kuhl*, 10 C. E. Green.

To maintain an equitable offset, the party seeking the benefit of it must show some equitable ground for being protected against his adversary's demand. The mere existence of a counter demand is not enough. Nor will the mere pendency of an account, out of which a cross-demand may arise, confer the right to an equitable offset: *Id.*

Consideration. See *Deed.*

Constitutional Law. See *Intoxicating Liquors.*

Right to remove Causes to Federal Court—Prevention by State Statute—Waiver.—The Constitution of the United States secures to citizens of another state than that in which suit is brought an absolute right to remove their cases into the Federal court, upon compliance with the terms of the twelfth section of the Judiciary Act: *Insurance Company* v. *Morse*, 20 Wall.

The obstruction to this right imposed by a statute of a state, which enacts: "That any fire insurance company, association or partnership incorporated by or organized under the laws of any other state of the United States, desiring to transact any such business as aforesaid by any agent

or agents in this state, shall first appoint an attorney in this state on whom process of law can be served, containing *an agreement that such company will not remove the suit for trial into the United States Circuit Court or Federal courts, and file in the office of the secretary of state a written instrument, duly signed and sealed, certifying such appointment, which shall continue until another attorney be substituted,"* is repugnant to the Constitution of the United States and the laws in pursuance thereof, and is illegal and void: *Id.*

The agreement of the insurance company, filed in pursuance of the act, derives no support from a statute thus unconstitutional, and is as void as it would be had no such statute been passed: *Id.*

Eminent Domain—Security of Possession of Land until Payment.—Where land has been taken under the exercise of the right of eminent domain, and a question is pending in a court of law as to the amount of compensation to which the landowner is entitled, he will be protected in his constitutional right to possession of his property until his compensation be ascertained and paid or tendered to him; and the company in whose favor the condemnation is made will not be permitted to take possession of the land on tendering so much of the compensation as is not in dispute, but will be restrained from so doing: *Mettler* v. *The Easton and Amboy Railroad Co.*, 10 C. E. Green.

To secure the landowner in his constitutional right, and at the same time spare the company unnecessary delay, the court will, on the latter's paying the landowner so much of the compensation as is undisputed and the costs of the suit in this court, and paying an amount sufficient to cover the disputed claim, to the end that the landowner may have the same, if adjudged by the court of law to be entitled thereto, permit the company to take possession of the land: *Id.*

CONTEMPT.

Not reviewable on Appeal.—This court has no power to reverse, on appeal, the imposition of a fine decreed by the Circuit Court for contempt of it: *New Orleans* v. *The Steamship Company*, 20 Wall.

CONTRACT.

Dismissal of Servant—Notice to terminate Contract.—Where a person agreed to serve in superintending a large hotel for another, at a compensation specified, either party being at liberty to terminate the contract on thirty days' notice to the other, and the person agreeing to superintend was ejected by the other on less than thirty days' notice, *Held*, in a suit for damages by the party thus ejected—the general issue being pleaded and notice of special matter given—that the defendant might prove that the party ejected was unfit to perform his duty by reason of the use of opiates, and by reason of unsound mental condition: *Lyon* v. *Pollard*, 20 Wall.

Where by the terms of a contract a party is bound to give thirty days' notice of an intention to terminate it, and having given the notice afterwards waives it, he may in fact renew the notice, though the form of his communication purport to insist on the notice which he has waived; and at the expiration of the required time the second document will operate as a notice: *Id.*

Though where, under a contract of hiring services, a party is bound

to give a certain number of days' notice to terminate it, it is not terminated until the full term of days has elapsed; yet where an action has been brought for damages for a dismissal without the proper notice, a notice of termination may be given, though the full number of days has not expired when an actual dismissal took place; this to show that the plaintiff had a right now to serve but a portion of the thirty days: *Id.*

DAMAGES. See *Replevin.*

DEBTOR AND CREDITOR. See *Agent; Power.*

DEED. See *Sale.*

Construction—Partial Want or Failure of Consideration of Note.—In construing a deed, proof is admissible of every material fact that will help to identify the person or thing intended, or which will enable the court to put themselves as near as may be in the position of the parties, and especially of the grantor, and the court will then construe the deed so as to give effect to that intention, when they can find enough in the deed to identify the land: *Swain* v. *Saltmarsh*, 54 N. H.

A defendant may show that he was induced to enter into the bargain for the purchase of land by the false and fraudulent representations of the plaintiff as to its location and quality, in order to lay the foundation for a claim that there was a partial want or failure of consideration of the note given for the purchase-money of said land: *Id.*

DIVORCE. See *Judgment.*

DONATIO MORTIS CAUSA. See *Gift.*

EMINENT DOMAIN. See *Constitutional Law.*

EQUITABLE SET-OFF. See *Collateral Security.*

ESTOPPEL. See *Agent; Insurance.*

EVIDENCE. See *Trust.*

FRAUD. See *Deed.*

FRAUDS, STATUTE OF.

Forbearance to collect Debt due by Another—Parties to Agreement to pay Debt of Another.—An averment that the defendant, in consideration that the plaintiff, to whom a third person was indebted, would forbear to collect his debt, promised to pay it, is to be taken as referring to forbearance to collect of the original debtor; it therefore describes a collateral undertaking, upon which no action can be sustained without proof of a written note or memorandum of the agreement: *Lang* v. *Henry*, 54 N. H.

It is as much a violation of the Statute of Frauds to prove by parol testimony an essential part as the whole of an agreement, of which the statute requires a note or memorandum in writing: *Id.*

The rule of law which authorizes the maintenance of an action upon a verbal promise to pay the debt of another, made upon a new and independent consideration, moving between the plaintiff and the defendant, for the purpose of conferring a benefit, not upon the original debtor, but upon the promissor, considered, and *held* inapplicable to the existing facts: *Id.*

A promise to pay the workmen in a shop, made as a part of the consideration for the purchase of the stock in the shop from the original debtor, which does not name the workmen, or mention the sum due to each, or the gross sum due to all of them, though not invalid because the consideration moves wholly from the original debtor, if subsequently assented to by the workmen, is insufficient to entitle them to recover the respective sums due them: *Id.*

Gift.

Donatio Mortis Causa—Requisites of—Evidence.—To constitute a valid gift *causa mortis*, three attributes must exist: 1. The gift must be made in contemplation of the donor's death. 2. It must be subject to the condition that it shall take effect only upon the donor's death by his then existing illness. 3. There must be a delivery of the subject of the donation: *Kenistons* v. *Sceva, Adm'r*, 54 N. H.

No particular form of words is necessary to give effect to the transaction, if the evidence of that which was said and done establishes the requisitions for its validity: *Id.*

Money and a negotiable promissory note may be the subjects of a gift *causa mortis*: *Id.*

The statute requires that the *delivery* of the gift shall be proved by two indifferent witnesses; but the proof of the other attributes of the gift is not defined nor limited by the statute: *Id.*

The admission of the intestate that he had delivered the property, is competent evidence upon the question of its delivery: *Id.*

A valid *donatio causa mortis* may be created by a deed: *Id.*

And it would seem a deed may in some cases be a proper and sufficient substitute for manual delivery: *Id.*

Growing Plants. See *Sale.*

Highway. See *Negligence.*

Liability of Town for not keeping in Repair—Sudden Freshet—Notice.—A town is not liable for injuries caused by a bridge being out of repair, if it became so suddenly and unexpectedly by reason of a freshet in the stream over which it was built, and sufficient time had not elapsed before the accident to enable the town authorities either to repair the bridge or guard travellers against the danger: *Jaquish* v. *The Town of Ithaca*, 35 or 36 Wis.

Notice to the chairman of the town board of supervisors (or, it seems, to any member of that board), of a defect in a bridge in such town, is notice to the town; and if thereafter no proper precautions are taken in due time to guard against accidents by reason of such defect, the town is chargeable with negligence: *Id.*

There being evidence tending to prove that the town authorities had notice of the defect in the bridge here in question, before plaintiff attempted to pass over it, and there being also conflicting evidence as to contributory negligence on plaintiff's part, and the court having submitted that question of fact to the jury, after giving the instructions desired by the defendant, this court cannot disturb the verdict, which was for the plaintiff: *Id.*

Husband and Wife.

Action by Married Woman—Assignment of Chose in Action by Hus-

band to Wife.—Every action in the courts of this state must be prosecuted in the name of the real party in interest, with certain exceptions mentioned in the statute: R. S., ch. 122, sect. 12: *Carpenter* v. *Tatro*, 35 or 36 Wis.

Under our statute (R. S., ch. 95), a married woman may acquire the legal title to a chose in action or other property transferred to her by her husband, if purchased with funds from her own separate estate; but if she has no separate estate, the assignment and transfer by him to her of a chose in action does not vest in her the legal title: *Id.*

Where a married woman brings suit to enforce a chose in action alleged to have been assigned to her by her husband, proof of such an assignment is inadmissible without proof that she had a separate estate out of which the consideration for such assignment was paid: *Id.*

This action is for necessaries furnished by plaintiff's husband to defendant's son, about ten years old; and it is alleged that the boy was driven from home by defendant's cruel treatment, and that the account sued on was assigned to plaintiff by her husband. There being no proof that plaintiff had a separate estate, out of which the account sued on was purchased of the husband, a judgment in her favor is reversed: *Id.*

Refusal of Wife to join in Conveyance of Land—Specific Performance.—Where a wife refuses to join in a conveyance of the lands which her husband has sold, and there is no proof of fraud on the part of the husband in her refusal, the court will not compel the husband to procure a conveyance or release by her, or require him to furnish an indemnity against her dower: *Reilly* v. *Smith and wife*, 10 C. E. Green.

Specific performance in such case refused, and the purchaser left to his remedy at law, it not appearing that he was willing to pay the full balance of the purchase-money and accept a deed from the vendor alone: *Id.*

INSURANCE.

Waiver of Condition—Additional Insurance.—A breach by the insured of a condition in the policy of insurance against fire, which by the terms of the policy would render it void, may be *waived* by the insurer: *Webster* v. *Phœnix Ins. Co.*, 35 or 36 Wis.

Action on a policy of insurance against fire. Defence, that the insured, between the issue of such policy and the loss, had taken additional insurance on the property in another company, without defendant's knowledge or consent, which, by the terms of the policy, would render it void. There was conflicting evidence as to whether defendant's agent knew of and consented to the additional insurance, *before* the loss; but it appeared that after the loss defendant was informed by the agent of such additional insurance, and, without notifying plaintiff of any refusal to pay on that ground, required her to furnish plans and specifications of the building destroyed, which she procured and furnished at considerable expense. *Held*, that defendant is *estopped* from setting up the defence above stated: *Id.*

The fact that the insured was required by *another* company to furnish such plans and specifications, each company acting independently of the other; or even the fact (if that were shown) that the two companies made the requirement *jointly*, would not affect the force of the estoppel: *Id*

Conditions—Warranty—Misrepresentations—Acts of Agent—Entirety

of Contract.—In contracts of insurance against fire, stipulations of the assured as to matters existing prior to the loss, and which *affect the risk itself* (including stipulations as to the *ownership of the property*), are more strictly enforced in favor of the insurer than those which relate to the mode in which a loss, after it has occurred, is to be established, adjusted and recovered: *Hinman* v. *Hartford Fire Ins. Co.*, 35 or 36 Wis.

The policy here sued on makes special reference to the application of the assured, as "his warranty" and a part of such policy, and it provides that if the assured, in his application, makes any erroneous representations, or omits to make known any fact material to the risk, or if he is not the sole and unconditional owner of the property insured, or (if said property be a building) of the land on which such building stands, "by a sole, unconditional and entire ownership and title, and [it] is not so expressed in the written portion of the policy," then the policy shall be void: *Held*, that the rights of the parties to this contract must be determined by the general rules of law applicable to the construction and enforcement of all written agreements: *Id.*

In the written application of the assured in this case, he stated, in answer to direct interrogatories, that the property (a hop-house and contents) was not mortgaged, and that he was the sole and undisputed owner thereof; and in answer to the question whether he owned the ground on which the building stood, and if not, how it was held, he said, "By contract." It appears that the building was a part of the realty; that his only title to the land was by virtue of a contract for the sale and purchase of it, entered into about five and a half years before, by the terms of which he was to pay nearly $1600 in five annual instalments, and all taxes accruing, and was to hold the land as tenant by sufferance of the other party, "subject to be removed as a tenant holding over," whenever default should be made in the payment of any of said instalments; and there was a further provision that on his failure to make any payment of purchase-money as specified, the agreement should be utterly void and all payments forfeited, at the option of the vendor. When the application and policy were made, the assured had paid only $200 of the purchase-money, and was in default of the remainder with interest: *Held*, 1. That knowledge of the true character of the interest of the assured in the property was material to the insurer in ascertaining the nature of the risk. 2. That the aforesaid answers, taken together, were equivalent to a statement that although the assured held the land and building under a contract of purchase, yet no person other than himself had any substantial interest in them; that he had fully paid for the land, and was the real owner by an equitable title in fee, with the right to enforce a conveyance to himself of the legal title; and such misrepresentation *rendered the policy void*: *Id.*

At the time of the application there were also outstanding certificates of the sale of the land for taxes for three successive years. Without determining the effect of these upon the contract of insurance in this case, the court intimates that when real estate proposed to be insured is encumbered by unpaid taxes or certificates of tax sales, if the terms of the contract of insurance required the assured to disclose the particulars of his title, the safe course will be for him to state in his application all the facts relating thereto: *Id.*

The assured testifies that when he applied for the insurance, the local

agent of the insurer asked him who built the hop-house, and on being told that the witness built it, replied, "Then you own the property, and have the right to get it insured." The uncontradicted testimony of the agent was, that he had no knowledge whatever that there was *any encumbrance* on the property: *Held*, that there was nothing in the evidence to show that the agent, with knowledge that the assured had not paid the purchase-money for the land, advised him that he could safely declare and warrant that he was the sole and undisputed owner of the building; and the assured must be held to have made that statement on his own responsibility: *Id.*

Personal property in said building, which was covered by the policy, and of which the assured was sole and absolute owner, was also destroyed by fire: *Held*, that plaintiff could not recover the value of such personal property, the contract of insurance being *entire: Id.*

INTEREST. See *Legacy.*

INTOXICATING LIQUORS.

Constitutionality of Law relating to Damages by Sale of.—The Act of July 2d 1870, which provides that the person who sells or furnishes to another intoxicating liquor in violation of law, shall be liable, in certain cases where death results, to any person dependent on the deceased for support, for all damage or loss occasioned by such injury, *held* constitutional: *Bedore* v. *Newton*, 54 N. H.

The widow of the deceased, who was dependent on him for support, may maintain an action for damages under this statute: *Id.*

JUDGMENT.

Collusive Decree of Divorce binding on Parties—Judgment of Another State—How far conclusive.—A party to a collusive divorce is bound by it, and cannot, upon suit for divorce in this state, take advantage of the fraud and illegality of the proceedings upon which such decree was based: *Nichols* v. *Nichols*, 10 C. E. Green.

The judgment of a court of general jurisdiction in any state in the Union is equally conclusive upon the parties in all the other states as in the state in which it was rendered. This, however, is subject to two qualifications: 1. If it appear by the record that the defendant was not served with process, and did not appear in person or by attorney, such judgment is void; and 2. If it appear by the record that defendant appeared by attorney, the defendant may disprove the authority of the attorney to appear for him: *Id.*

Where a decree of divorce has been acquiesced in for several years, and the plaintiff has again been married, the court will not disturb the decree for the purpose of giving alimony. Such intervention should be based on public policy; but no such reason should suffice where, after the acquiescence of both parties in the decree for four years, an innocent person has been involved by marriage, and the opening of the decree would involve her in distress, and perhaps disgrace: *Id.*

LEGACY.

Charged upon Land.—Land charged with the payment of legacies and interest thereon, when the testator clearly intended that the charge should be a continuing and subsisting security for the payment thereof,

cannot be relieved from such charge by the payment by the devisee of the full amount of the legacies to the executors: *Grode* v. *Van Valen*, 10 C. E. Green.

The lien of a legacy charged on land cannot be divested, except by an actual payment or release, or by a decree in a suit in which such legatee or his personal representative is a party: *Id.*

Interest on.—A statement made by a testator, estimating the amount of his estate with reference to his will, and the disposition of it therein made, is inadmissible to show at what rate interest should be charged against the estate upon a legacy under the will: *Fowler and Wife* v. *Colt et al.*, 10 C. E. Green.

Where it is the duty of executors to separate a legacy from the estate within a reasonable time, and to invest it with a view to accumulation and the necessities of the support and education of the legatee, their neglect of such duty makes them chargeable with interest at the legal rate for the time being: *Id.*

Where a testator's whole estate was vested at his death in a certain stock of which he held the whole, in ascertaining the interest due upon a pecuniary legacy given by the will, the amount of which legacy has not been separated as it should have been from the estate, the dividends which have been, during all the time for which interest is to be ascertained, irregular and desultory, not based on the earnings of the company, and are no evidence of the income from the shares, are no guide as to the rate of interest to be charged, but interest should in such case be calculated at the legal rate, from time to time, during the period required: *Id.*

The omission of executors to invest a legacy as intended by the testator will not be excused by the fact that it was for the interest of the residuary legatees that the legacy should not be separated from the estate so long as it could be avoided: *Id.*

LIFE ESTATE. See *Power*.

MASTER AND SERVANT. See *Contract*.

MERGER.

Purchase of Fee by the Mortgagee—Second Mortgagee bound to redeem.—It does not necessarily follow that by a mortgagee's becoming the purchaser of the premises and taking title therefor at the sale under the foreclosure, his mortgage is merged or extinguished in his legal title: *Parker* v. *Child*, 10 C. E. Green.

A purchaser (first mortgagee) at a sale under a foreclosure-suit upon his mortgage, to which suit a second mortgagee was, by oversight, not made a party, is entitled to require the second mortgagee to redeem in a reasonable time, or be foreclosed: *Id.*

Such purchaser, as prior encumbrancer, must be redeemed not only to the full amount due for principal and interest upon his mortgage, but also to the full amount of the purchase-money paid by him over and above such amount, the excess having been appropriated in payment of claims prior to the second mortgage, and the purchaser being thereby subrogated to the rights of the holders of those claims: *Id.*

The purchaser, if redeemed, must account for the rents and profits during his occupation of the premises, and cancel a mortgage given by him thereon, after he had received his deed: *Id.*

MORTGAGE. See *Merger; Sheriff's Sale; Waste.*

Lien of Personal Decree for Deficiency—A personal decree for deficiency of proceeds to pay the mortgage-debt does not become a lien upon the real property of the person against whom it is taken, until after the sale, and in case a deficiency is found to exist: *Bell* v. *Gilmore*, 10 C. E. Green.

MUNICIPAL CORPORATION.

Acceptance of Trust—Powers in Execution.—Municipal corporations, in this state, may take and hold property in trust for any purpose not foreign to their institution, nor incompatible with the objects of their organization: *Sargent* v. *Cornish*, 54 N. H.

A town is capable of receiving by bequest and holding in trust a sum of money, the income of which shall be invested yearly in the purchase and use for display of United States flags: *Id.*

Although capable of holding such fund for the purpose designated, a town has not the power of raising money by taxation for the purpose of executing the trust: *Id.*

Where a testator bequeathed a sum of money to a town "on condition that the same be accepted, and invested by said town so as to yield an income of not less than six per centum per annum, which income shall be invested yearly in 'United States flags,' to be used within the said town on all proper occasions," with provision for a forfeiture of the legacy in case the town should omit to fulfil the condition: *Held*, that the town might properly expend a reasonable porton of the income of the fund in the purchase and erection of flag-staffs, ropes, halliards and other necessary paraphernalia: *Id.*

NAVIGABLE WATERS. See *Admiralty.*

NEGLIGENCE. See *Highway.*

Highway—Obstruction—Stump.—In an action against a town for an injury alleged to have been caused by the insufficiency of a highway, the defect alleged was, that "there was a large stump in or near the middle of the main travelled track of said road," against which plaintiff's wagon struck, causing the injury complained of. *Held*, that the word "stump" must be understood as here meaning "that part of the tree remaining in the earth after the stem or trunk is cut off" (which is its usual signification), and that the complaint sufficiently alleges a defect in the highway: *Cremer, Adm'r*, v. *The Town of Portland*, 35 or 36 Wis.

The complaint avers that "plaintiff's wagon struck said stump, which threw plaintiff down upon his wagon rack, by reason of which he was greatly injured; that by reason of such injury his life was and is greatly endangered; that ever since that time he has suffered great bodily and mental pain; that he will be permanently crippled and injured for life; that ever since the time aforesaid he has been wholly unable to perform any manual labor, and has been wholly unable to perform his necessary duties and business by reason of said injury." *Held*, that these averments must be reasonably construed to mean that plaintiff will be "permanently crippled and injured for life" *because of the injuries* produced by the insufficiency of the highway; and there was therefore no error in admitting evidence of such *permanent* injury: *Id.*

Whether it was necessary to *aver* in the complaint that plaintiff was permanently injured, before *proof* of permanent injury could be received, is not here decided: *Id.*

In such actions it is only where the *uncontradicted* evidence shows a state of facts from which the inference is indubitable, either that the highway was sufficient, or that plaintiff was guilty of contributory negligence—that the court will be justified in taking those questions from the jury: *Id.*

Plaintiff's evidence tended to prove that he was driving his team along the highway at a slow walk, having his boys in the wagon with him; that when the wheel of his wagon struck the stump and caused the injuries complained of, he was holding the reins with one hand, and with the other assisting his boys to a seat; and that in doing so his attention was diverted for a few minutes from his team and from the highway. *Held*, that the court did not err in refusing to nonsuit the plaintiff, nor in charging that his testimony tended to show that when injured he was in the exercise of ordinary care and diligence: *Id.*

Any want of ordinary care, however slight, on the part of the injured person, which contributed to the injury received on a defective highway, will prevent a recovery: *Id.*

"Slight negligence" is not a slight want of ordinary care, but a want of *extraordinary* care; and the law does not require such care of a person injured by the negligence of another, as a condition precedent to his recovery: 22 Wis. 625; 29 Id. 144: *Id.*

Defendant asked instructions to the effect that plaintiff could not recover (1) if guilty of negligence (though slight) which contributed directly to the injury, or (2) if "guilty of any negligence which contributed directly or proximately to the injury." *Held*, that these instructions were properly refused: *Id.*

Power.

Life Tenant—Judgment against—Exercise of the Power to sell and apply Income.—A judgment recovered against a devisee for life, vested under the will with power to consent that the executors should sell the real estate at their discretion, and appropriate the income for the support of such devisee and his family, during the devisee's life, does not extinguish the power. The lien of the judgment is subject to the power: *Leggett* v. *Doremus*, 10 C. E. Green.

The power to consent to a sale is not extinguished in all cases where the donee of the power is the life tenant, even by the absolute alienation by him of his life estate. The rule is that, so long as nothing is done in derogation of the alienee's estate, the alienation has no operation on the power: *Id.*

When a power is executed, the person taking under it takes under him who created the power, and not under him who executes it. The only exceptions are where the person executing the power has granted a lease or any other interest which he may do by virtue of his estate, for then he is not allowed to defeat his own act. But suffering a judgment is not within the exception as an act done by the party; it is a proceeding *in invitum*, and therefore falls within the rule: *Id.*

Removal of Causes. See *Constitutional Law.*

REPLEVIN.

Damages—Remission of Part.—In *replevin*, where plaintiff elects to take the *value* of the property with damages for the detention, the rule of damages should be the same as in *trover: Bigelow* v. *Doolittle*, 35 or 36 Wis.

In this action of replevin, a part of the property consisted of a wagon, buggy and reaper; and plaintiff elected to take the value, with damages for the detention; and such value was ascertained as *of the time of the taking*. *Held*, that the damages for the detention in this case should be *interest* on the value of the property, so ascertained, from the taking to the verdict: *Id.*

The jury were instructed to allow, as damages for the detention, "the value of the use of the wagon and buggy, taking into account what part of the year the same would be used," and the value of the use of the reaper for the two seasons (of 1872 and 1873) which intervened between the taking and the trial. *Held*, erroneous: *Id.*

The excess of the damages awarded by the jury for the detention of the property, above interest on the sum found as its value at the time of taking, being readily determined by calculation, this court orders that in case the plaintiff shall *remit* such excess and pay the costs in this court, the judgment stand affirmed; otherwise, that it be reversed: *Id.*

SALE. See *Warranty.*

Growing Trees—Terms of Grant—Time of Removal.—When, in a deed of growing trees to be removed by the grantee from the grantor's land, the terms of grant, taken in their literal and usual sense, signify an absolute conveyance of the title of the trees, the grant is not made a conditional one by a stipulation (express or implied) as to the time of removal: *Hoit* v. *The Stratton Mills*, 54 N. H.

If no time is expressly fixed, the construction generally is, that the grantee has a reasonable time for removal: *Id.*

If the grantee, after the expiration of such reasonable time, enters and removes the trees which were absolutely conveyed to him by the deed, he is liable in trespass for the entry, but not for the value of the trees: *Id.*

SET-OFF. See *Collateral Security.*

SHERIFF'S SALE.

Adjournment—Combination of Bidders.—A refusal to adjourn a sale, in the exercise by the sheriff of a reasonable discretion, is not sufficient ground for setting the sale aside: *Morris* v. *Woodward*, 10 C. E. Green.

Where an agreement is made by the complainant with a mortgagee, defendant present at the sale of mortgaged premises, and intending to buy in the property to protect his claim, if necessary, that if the mortgagee would not bid, and would permit him to buy the property, he would pay his claim; and by reason of the latter not bidding in pursuance of such agreement, the property brought much less than it otherwise would have done, thereby throwing upon the mortgagor, against whom the complainant had taken a personal decree for deficiency, a liability for a greater deficiency, such agreement is a fraud upon the mortgagor, which vitiates the sale: *Id.*

SPECIFIC PERFORMANCE. See *Husband and Wife.*

SUBROGATION.

Equitable Right—Only goes so far as is necessary for Protection.—The right of substitution or subrogation is a purely equitable one, and the extent to which it will be exercised must often depend upon circumstances. Whether it will be extended to the extremest point, so as to include all the rights of the creditor, must often depend on whether it is necessary to the protection of the surety that it should be so: *Matter of Attachment against Abram S. Hewitt*, 10 C. E. Green.

Where a surety who was subrogated to the rights of a landowner, to whom the former had been compelled to pay the debt of his principal for land taken by the principal (a railroad company), under the exercise of the right of eminent domain, applied to this court to enjoin the use of the company's road over the land: *Held*, that it was not necessary to his protection to prevent such use, there being nothing to be gained by him through such injunction, the company being insolvent and its affairs in the hands of a receiver, and the road being operated for the accommodation of the public merely by a trustee of holders of bonds of the company, with a view to a more advantageous sale of the property on foreclosure: *Id.*

SURETY. See *Subrogation.*

TOWN. See *Highway; Negligence.*

TRESPASS. See *Sale.*

TRUST. See *Municipal Corporation.*

Sale of Land to pay Legacies charged on it—Liability of Purchaser for Application of Purchase-money.—A charge of all testator's debts and funeral expenses, &c., upon all his estate, real and personal, not otherwise specifically bequeathed, is equivalent to a trust for sale of all the real and personal estate not otherwise specifically bequeathed, for the purpose of paying those debts and expenses: *Dewey's Executors* v. *Ruggles*, 10 C. E. Green.

The general rule is, that a purchaser is not bound to see to the application of the purchase-money when the testator's debts are charged generally upon his estate. There are exceptions to it, when there is a breach of trust by the executors, and the purchaser is a party to it, and where the purchase is after the institution of a suit which takes the administration of the estate out of the hands of the trustee: *Id.*

Declaration of—Transfer of Possession not necessary—Parol Evidence to explain Deed.—It is not necessary to a trust that there should be any transfer of property, whether the fund be in the possession of the donor or of another. The property may remain as it was, and the donor may constitute himself, as the possessor, trustee of it: *Eaton* v. *Cook*, 10 C. E. Green.

A direction, by written instrument or by word, to a debtor by his creditor to hold the money due in trust for a third person, such direction being communicated to the debtor, creates a trust in favor of the donee: *Id.*

In construing a declaration of trust, "I hereby cancel the above bond and give it voluntarily to J. C. and her heirs," verbal declarations of the donor made prior to and contemporaneously with the gift, and

relating to it, are competent evidence as to whom he meant to designate by the words "her heirs:" *Id.*

VENDOR. See *Husband and Wife.*

WARRANTY.

Sale of Personalty—Recoupment for Breach.—The law is well settled in this state, that "in case of a warranty, direct or implied, where the article purchased proves defective or unfit for the use intended, the purchaser, without returning or offering to return it, and without notifying the vendor of the defects, may bring his action for the recovery of damages, or, if sued for the price," may recoup damages for such breach: *Fisk* v. *Tank*, 12 Wis. 302, and other cases in this court: *Bonnell* v. *Jacobs*, 35 or 36 Wis.

Where the warranty alleged was, that a furnace sold to defendant and put up in his dwelling-house by plaintiff, "would work efficiently, and properly heat such dwelling-house." the jury were instructed that if there was any defect in the furnace, it was defendant's duty to notify plaintiff that it was defective, and that he should come and perfect it or take it away within a reasonable time; and that if the defendant kept the furnace without giving such notice, he thereby waived any claim for the defect. *Held*, error: *Id.*

WASTE.

Mortgagor not permitted to commit.—A mortgagor will not be permitted to commit waste upon the mortgaged premises to the extent of rendering them an insufficient security for the mortgage-debt: *Coggill* v. *Millburn Land Company*, 10 C. E. Green.

No authority to commit waste upon mortgaged premises will be implied from the object for which the property was purchased, nor from the price agreed to be paid: *Id.*

WITNESS.

Parties—Depositions—Secondary Evidence.—Under the Act of July 2d 1864, providing that in civil actions in courts of the United States there shall be no exclusion of any witness, "because he is a party to or interested in the issue tried;" witnesses may, other things allowing, testify (without any order of court) by deposition. And if not satisfied with a deposition which they have given, have a right, without order of court, to give a second one: *Cornett* v. *Williams*, 20 Wall.

The rule established by this court as to the introduction of secondary evidence—that it must be the best which the party has it in his power to produce—is to be so applied as to promote the ends of justice and guard against frauds, surprise, and imposition. The court has not gone to the length of the English adjudications, that there are no degrees in secondary evidence. Hence, where the records of a court were all burnt during the rebellion, what appeared to be a copy of an officially certified copy was held properly received; the certified copy, if any existed, not being in the party's custody or plain control, and there being no positive evidence that it existed, though there was evidence tending to show that it did. There is nothing in the Act of Congress of March 3d 1871 (16 Stat. at Large 474), providing for putting in a permanent form proof of the contents of judicial records, nor in the statute of Texas of 11th February 1850 (Paschall's Digest, Article 4969), on the same subject, which changes this rule: *Id.*